Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues	MM Docket No. 92-259

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

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Tele-Communications, Inc. ("TCI"), hereby submits its Reply in this proceeding.

I. A SENSIBLE IMPLEMENTATION SCHEDULE IS CRITICAL

The must carry / retransmission consent provisions of the 1992 Cable Act threaten substantial dislocation of existing cable service. To avoid unnecessary disruption, it is critical that cable operators learn as early as possible the status of each broadcast station under the new signal carriage regime. In an effort to simplify broadcasters' decisionmaking, TCI has already set forth its basic business plan. 1/ The Commission

1/ See Broadcasting, p. 8, January 18, 1993. See Attachment A.

should further facilitate the transition process by adopting: (1) an early election date; (2) procedures that discourage delays in communication; and (3) a uniform effective date. TCI described these three measures in detail in its initial Comments.

The Commission should reject the suggestion that the must carry provisions go into effect June 1 -- fully four months before retransmission consent.[2/] The statute does not compel that result, and its supporters failed to articulate any reason for adopting it. Any separation in the implementation dates for must carry and retransmission consent would only exacerbate service dislocations.

Cable systems across the country would be forced to make significant line-up changes, not once, but twice. The result would be a great increase in confusion and inconvenience among cable subscribers. The additional financial costs to the cable operators are obvious. In fairness, the Commission should do whatever it can to equitably shift some of that burden (such as notice and reporting requirements) to the proponents and beneficiaries of the new regime -- the broadcast industry. Must carry and retransmission consent should not be used to penalize the cable industry and its subscribers at the very time Congress and the FCC seek to restrain the cost of cable service and

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2/ See, e.g., NAB Comments at 43.

reemphasize the importance of the rights of the cable subscriber in the regulatory scheme. If the new signal carriage regime is as important to the broadcast industry as is claimed, it should not be too much to expect that broadcasters bear as much of the implementation burden as feasible.

II. MUST CARRY IMPLEMENTATION

A. Market Designation

Numerous broadcast Commenters proposed that, for purposes of commercial must carry, a cable system should be "located" in any (and every) market in which it serves subscribers, regardless of the burden this approach would impose on cable systems that happen to serve several ADIs. A far better approach would be to "locate" a cable system based on its "principal headend."[3/] This approach would mirror that specifically adopted for non-commercial stations and would ensure that a community is initially assigned to only a single market. Then, just as the statute suggests, it would be up to the Commission to decide whether signals from a second market should be added to the system's must carry obligations.[4/]

3/ TCI advocates the "principal headend" approach only for purposes of this proceeding. In other areas (such as rate regulation), other factors may warrant a different regulatory approach.

4/ ABC's suggestion that only broadcasters can petition for a market redesignation, ABC Comments at 6, is contrary to the statute and would preclude fair administration of must carry.

Several Commenters further argued that the "principal headend" approach should be rejected for commercial must carry and carefully scrutinized for non-commercial must carry, because cable operators cannot be trusted to fairly identify their principal headend. Instead of assuming the worst, the Commission should endorse the "principal headend" approach and defer to each operator's designation of that site. The Commission should revisit this issue only if evidence is presented of actual abuse, which is tellingly absent from opponents' Comments.

B. Channel Positioning

Many broadcast Commenters argued against cable operators having any discretion with regard to channel positioning. INTV, for example, argued for regulations that "leave[] the cable operator where he or she should be -- on the sidelines."[5/] TCI welcomes broadcasters to resolve conflicting channel claims among themselves, but their Comments reveal no understanding of the principal goals of the 1992 Act.

TCI has committed to early implementation of "low cost" basic, and "optional" service levels, which customers may "buy around."[6/] Because TCI's systems are not all addressable, it

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5/ INTV Comments at 16.

6/ See note 1, supra.

can only provide this consumer choice if broadcast channels are placed together. Suggestions that technical concerns do not actually restrain such offerings do not comport with reality. If the parochial interests of broadcast channel positioning are allowed to "trump" rate regulation and marketing restructuring, the primary purposes of the Act will be frustrated.

C. VBI

The statute says it clearly: except for closed caption transmissions, other "program-related" material must be carried only where "technically feasible." 47 U.S.C. §§ 614 (b)(3), 615(g). Despite the clarity of the statutory provision, broadcast Commenters have done their best to cloud the issue.

NAB concedes that "Congress did not expect cable operators to . . . reconstruct their systems if they are presently unable to retransmit certain program-related material."[7/] It goes on to argue, however, that cable operators should not be allowed to design "new or improved systems that make such retransmission impossible."[8/] TCI is concerned that NAB's proposal is so broad as to potentially frustrate the development of new technologies, including TCI's announced deployment of digital compression, which relies on squeezing the primary video (with a

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7/ NAB Comments at 24.

8/ Id.

limited amount of VBI)[9/] onto smaller bandwidth. NAB's proposal would disserve Congress' clear statement that a broadcaster's VBI transmissions should not dictate cable technology, as well as the command of Section 157 of the Communications Act to promote new technology.

D. Substantial Duplication

In its initial Comments, TCI suggested that substantial duplication should be measured in terms of both primetime and all-day schedules, with duplication of more than 50 percent of either constituting substantial duplication. Although some Commenters focused on a single measurement, TCI continues to believe the dual test is preferable, because it recognizes the special importance of primetime viewing, without ignoring the vast majority of the broadcast day.[10/] TCI also believes duplicating

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9/ TCI reiterates that it will comply with the law and that closed captioning, as well as program-related material, as defined in WGN Continental Broadcasting v. United Video, 628 F.2d 622, 626 (7th Cir. 1982), will be carried. As APTS put it, "program related material is material that is integrally as opposed to tangentially-related to the primary programming. APTS Comments at 26.

10/ Several Commenters noted that overnight viewing (midnight to 6 a.m.) is so minimal that it should be excluded from the broadcast day calculation. TCI supports this modification to its original proposal.

Numerous Commenters also suggested that the primetime measurement be defined as 14 hours per week of duplicating program, instead of a 50% cut-off. TCI supports this modification as well. In fact, if primetime is defined as broadly as 6 p.m. to 11 p.m., such restriction is essential.

programming should be included in the calculation, regardless of whether it is aired on a simultaneous or non-simultaneous basis. As ABC noted, the dramatic rise of video cassette recorders has greatly diminished the value of time diversity.[11/]

E. Program Exclusivity

In its initial Comments, TCI advocated the elimination of the existing program exclusivity rules. Several other Commenters advanced similar arguments. The new signal carriage requirements, after all, undermine the fundamental premise on which those exclusivity rules were based.[12/] In the past, a local broadcast station was otherwise powerless to stop a cable operator from "importing" a duplicating signal. Under the new regime, stations electing retransmission consent will have the opportunity to insist on exclusivity as a condition of carriage. Exclusivity terms should, therefore, be reached through free-market negotiations, rather than Commission fiat.

If the Commission is intent on leaving the program exlusivity rules in place, it must at least create a new

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11/ ABC Comments at 17-18. See also 47 C.F.R. §§76.92, 76.151 (program exclusivity blackouts apply regardless of whether programing is aired simultaneously).

12/ The program exclusivity rules were "designed . . . to enhance a broadcaster's competitive posture vis-a-vis cable systems by allowing the exercise of exclusive rights to programming." Program Exclusivity in the Cable and Broadcast Industries, 64 R.R.2d. 1818, 1859 (1988).

exemption for stations eligible for must carry. If a station's proximity entitles it to insist on cable carriage, it makes no sense to simultaneously require the cable operator to delete some or all of the programming carried by that station.

Above all, the Commission must reject the requests of numerous broadcast Commenters to use the current situation as an opportunity to expand the reach of their exclusivity protection.[13/] The 1992 Act has already dramatically transformed the relationship between broadcasters and cable operators. This is hardly the time to give broadcasters even more control over cable carriage.[14/] Indeed, even NAB concedes this would be an inappropriate time to make such adjustments.[15/]

III. RETRANSMISSION CONSENT

TCI has stated publicly on several occasions that it does not intend to pay broadcast stations for a grant of

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13/ See, e.g. Appalachian Broadcasting Corp. Comments at 9-14 (seeking expansion of the exclusivity zone to ADI-wide and elimination of the "significantly viewed" exception).

14/ Although TCI supports updating the Section 76.51 list, a review of Comments submitted suggests the update might only increase confusion in an already confusing time. Unless the Commission is prepared to take the steps necessary to avoid disruption to long established viewing patterns, by ensuring the "grandfathered" status of favorable copyright and exclusivity treatment, it should conclude an update is not "necessary" at this time. See 47 U.S.C. § 534(f); Copyright Office Comments at 6.

15/ NAB Comments at 20.

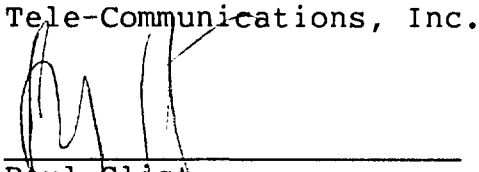
"retransmission consent." TCI recognizes, however, that so long as retransmission consent is statutorily mandated, it will be required, at least in some cases, to reach private carriage agreements that include a grant of retransmission consent. In fact, TCI hopes to voluntarily enter into private carriage agreements in other contexts. Finally, TCI cautions the Commission to ensure that programmers and networks do not unduly restrict or inhibit the granting of retransmission consent.

CONCLUSION

The Commission should adopt substantive and procedural regulations in this proceeding that will minimize the burden on cable operators and the likelihood of substantial disruption to cable service.

Respectfully submitted,

Tele-Communications, Inc.

By 

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